



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 15, 1998

Mr. Charles M. Allen, II
Legal Office
Richardson Police Department
P.O. Box 831078
Richardson, Texas 75083-1078

OR98-2189

Dear Mr. Allen:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. We assigned your request ID# 118150.

The City of Richardson Police Department (the "department") received a written request for "Officer William Phillips' personnel and Internal Affairs files ... [and] all departmental memos regarding the officer." This request was apparently clarified in a telephone conversation with the requester, and the request is construed to include the psychological evaluations of Officer Phillips. You contend that the requested information is excepted from disclosure pursuant to sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and have examined the documents that you have submitted as responsive to this request.

Government Code Section 552.101 excepts from disclosure "information deemed confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Local Government Code section 143.089(g) authorizes police and fire departments to maintain records of its officers for the department's internal use; if "reasonably related to the police or fire fighter's employment" these records are confidential. Open Records Decision No. 562 at 7 (1990). In *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946 (Tex. App.--Austin 1993, writ denied), the court determined that section 143.089(g) exempted these internal files from the disclosure requirements of the Government Code.

However, "the exclusion of records under section (g) does not diminish the public's right under the Open Records Act to obtain access to information in fire fighter's or police officer's personnel files maintained by a civil service department under subsection (a) of the statute." Open Records Decision No. 562 at 7 (1990). We shall refer to files maintained

pursuant to subsection (a) of this statute as "civil service" files; they must include the following records:

- (1) a commendation, congratulation, or honor bestowed on the fire fighter or police officer by a member of the public or by the employing department for an action, duty, or activity that relates to the person's official duties;
- (2) any misconduct by the fire fighter or police officer if the letter, memorandum, or document is from the employing department and if the misconduct resulted in disciplinary action by the employing department in accordance with this chapter; and
- (3) the periodic evaluation of the fire fighter or police officer by a supervisor.

Subsections (b) and (c) of this statute exclude from the civil service file unsubstantiated allegations of misconduct and records of disciplinary actions taken without cause or sufficient evidentiary support. Subsection (d) provides the officer with notice of and an opportunity to respond to any "notation of negative impact" in his civil service file.

You do not indicate, and we cannot determine which of the submitted documents are maintained by the department in a civil service file and which are maintained in a "section (g)" file. The former are public information and must be released, unless otherwise excepted from disclosure by a provision of the Government Code; the latter are confidential and must not be released.

We now address grounds for excepting information that is maintained in this officer's civil service file. Government Code section 552.117(2) excepts from public disclosure a peace officer's home address, home telephone number, social security number, and information concerning whether the peace officer has family members. Government Code section 552.130 (a)(1) excepts information related to motor vehicle operators' or drivers' licenses. We note that information of these types has been redacted from the documents submitted as your Exhibit "F". We have also marked other information of these types (*e.g.* photocopies of driver's license and driving record); this information must be withheld. However, we note that you have redacted date of birth information from these documents as well. You have not urged an exception for this information and none are apparent; this information is presumed to be public.

You have submitted the officer's Employment Eligibility Verification, Form I-9, to this office for review. Form I-9 is governed by title 8, section 1324a of the United States Code, which provides that the form "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. 8 U.S.C. § 1324a(b)(5); *see* 8 C.F.R. § 274a.2(b)(4). Release of the requested document under the Open Records Act would be "for purposes other than for enforcement"

of the referenced federal statutes. Accordingly, we conclude that Form I-9 is confidential under section 552.101 of the Government Code and have marked this document accordingly.

Health and Safety Code section 611.002 makes confidential, *inter alia*, records of the identity, diagnosis, evaluation or treatment of a patient that are created or maintained by mental health professionals, with exceptions not applicable here. The psychological evaluations submitted as your exhibit "E" are such records and must therefore be withheld under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code.

Section 552.101 exceptions to disclosure also apply to information made confidential by the common-law right to privacy. *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld under section 552.101 in conjunction with the common-law right to privacy if the information contains highly intimate or embarrassing facts about a person's private affairs such that release of the information would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. *Id.* Financial information concerning an individual is in some cases protected by a common-law right of privacy. *See* Open Records Decision Nos. 545 (1990), 523 (1989). A previous opinion of this office states that "all financial information relating to an individual . . . ordinarily satisfies the first requirement of common law privacy, in that it constitutes highly intimate or embarrassing facts about the individual, such that its public disclosure would be highly objectionable to a person of ordinary sensibilities." Open Records Decision No. 373 at 3 (1983). As we believe that no legitimate public interest exists in this officer's Texas Municipal Retirement System account, we conclude that you must withhold from public disclosure the documents related to this account. We have marked the documents accordingly.

Government Code section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990) The city must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly

threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986)

In your letter dated January 26, 1997, you indicated that an attorney had been retained who "implied that civil litigation is pending" and that a demand letter was being drafted. These assertions are the sole support for your position that litigation is reasonably anticipated. We note the length of time since this contact, the assertion that a threat of litigation was merely implied, the lack of a showing that a demand was actually made or a threat to sue repeated, or suit filed. We also note that this exception was rejected when urged in a related request by your department and that you have not expanded on your previous argument. *See* Open Records Letter No. 98-1781 (1998). We conclude that you have not met the requisite showing that litigation is reasonably anticipated. Therefore, you may not rely on section 552.103 to withhold the information from the requestor.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Michael J. Burns
Assistant Attorney General
Open Records Division

MJB/ch

Ref.: ID# 118150

Enclosures: Marked documents

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(w/o enclosures)